Supreme Court, U.S.
FILED

No. (1)

07584 JUN 17 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

In The

Supreme Court of the United States

DANNY RAY LEE,

Petitioner,

v.

BURL CAIN, Warden,
Louisiana State Penitentiary,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES E. BOREN
Louisiana Bar Roll No. 03252
830 Main Street
Baton Rouge, LA 70802
Telephone: 225-387-5786

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Fifth Circuit erred in denying Danny Ray Lee a Certificate of Appealability about whether reasonable jurists would find it debatable that the district court erred when it found that his habeas corpus petition was time-barred under the one year statute of limitations period in the Antiterrorism and Effective Death Penalty Act [28 U.S.C. § 2244(d)]?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	3
ARGUMENT	7
A. Actual Time Line of Danny Ray Lee's Appeal Process	9
B. Effect of Danny Ray Lee's Out-Of-Time Appeal	11
C. Jurists of Reason In Fact Debate Whether An Out-Of-Time Appeal Mechanism Restarts the Direct Review of a Conviction	12
D. Federal Determination – Fifth Circuit, Sixth Circuit and Ninth Circuit	13
E. State Characterization – Fourth Circuit, Eighth Circuit and Tenth Circuit	16
F. The Louisiana Law Analysis and *Lee v. Cain*	19
CONCLUSION	22

TABLE OF CONTENTS – Continued

Page

APPENDIX

United States Court of Appeals for the Fifth Circuit 3/25/08, Denial of Certificate of Appealability.....App. 1

United States District Court, W. D. of Louisiana 7/11/07, Denial of Certificate of Appealability.....App. 3

Louisiana Sixteenth Judicial District Court 6/24/03, Order granting a New Trial.....App. 5

Louisiana First Circuit Court of Appeal 2/16/01, Conditional affirm of the out-of-time appeal ordering the District Court to examine whether there was a waiver of the conflict of interest [The issue upon which Lee was granted a new trial.].....App. 8

Chart distinguishing Courts of Appeal Decisions.....App. 20

TABLE OF AUTHORITIES

Page

CASES

Carey v. Saffold, 536 U.S. 214 (1999) 19

Cockerham v. Cain, 283 F.3d 657 (5th Cir. 2002) 12

Ex Parte Daigle, 848 S.W.2d 691 (Tex. Crim. App. 1993) 14

Ex Parte Torres, 943 S.W.2d 469 (Tex. Crim. App. 1997) 13

Frasch v. Peguese, 414 F.3d 518 (4th Cir. 2001) 16, 17, 18

Hemmerle v. Schriro, 2007 WL 2050945 (9th Cir. 2007) 15, 16

Lopez v. Wilson, 426 F.3d 339 (6th Cir. 2005) 14, 15

Orange v. Calbone, 318 F.3d 1167 (10th Cir. 2003) 17, 18

Pace v. DiGuglielmo, 544 U.S. 408 (2005) 23

Roberts v. Cockrell, 319 F.3d 690 (5th Cir. 2003) 11

Salinas v. Dretke, 354 F.3d 425 (5th Cir. 2004) 13, 14, 16

State v. Counterman, 475 So.2d 336 (La. 1985) 12, 20, 21

Strickland v. Washington, 466 U.S. 668 (1984) 7

Summers v. Schriro, 481 F.3d 710 (9th Cir. 2007) 15

Williams v. Taylor, 529 U.S 420 (2000) 18

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISION

U.S. Const. amend. VI 1, 20

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2244(d) ..... *passim*

28 U.S.C. § 2253(c) 1, 2, 7

28 U.S.C. § 2254 ..... 2, 5, 10

OTHER AUTHORITIES

Arizona Rules of Criminal Procedure, Rule 32 15

Louisiana Code of Criminal Procedure, Article 930.3 20

Ohio Rule of Appellate Procedure 26(B) 14

OPINIONS BELOW

The Order denying a Certificate of Appealability issued by the U.S. Court of Appeals for the Fifth Circuit (App. 1, *infra*) is not reported. The Order denying a Certificate of Appealability issued by the U.S. District Court for the Western District of Louisiana (App. 2, *infra*) is not reported.

STATEMENT OF JURISDICTION

The Order denying a Certificate of Appealability was issued by the U.S. Court of Appeals for the Fifth Circuit on March 25, 2008. Petitioner timely seeks review of this denial under 28 U.S.C. § 2253, in accordance with the jurisdiction of this court under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

CONSTITUTIONAL PROVISIONS

The petitioner asserts a denial of his Sixth Amendment right to counsel, in so much as his appointed counsel was "constitutionally ineffective." The Sixth Amendment reads as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

FEDERAL STATUATORY PROVISIONS

The underlying habeas corpus petition arises from an assertion of right under 28 U.S.C. § 2254(a), which reads as follows:

> "(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

After applying for the petition in the district court, petitioner was denied the requisite Certificate of Appealability under 28 U.S.C. § 2253(c)(1)(A), which reads in pertinent part as follows:

> "(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention

> complained of arises out of process issued by a State court . . . "

The reason for denying the certificate of appealability, stated by the United States Court of Appeal for the Fifth Circuit, rests on a procedural requirement under 28 U.S.C. § 2244(d)(1)(A), which reads in pertinent part as follows:

> "(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review . . . "

STATEMENT OF THE CASE

Petitioner Danny Lee was convicted of second-degree murder on April 5, 1995 in the Sixteenth Judicial District Court in the State of Louisiana and sentenced to life imprisonment. Petitioner's direct appeal from the judgment of the trial court was abandoned by his lawyer without petitioner's knowledge or consent. After filing for an extension of the time for appeal, his lawyer did not file a brief and did not inform Mr. Lee of the status of his case. The Louisiana First Circuit Court of Appeals conducted a

patent error review and affirmed petitioner's conviction on August 19, 1996.

After a 231 day lapse (the amount of time it took for Lee to realize that his case had been abandoned), the petitioner filed a pro se application for post-conviction relief in the Louisiana Sixteenth District Judicial Court on May 7, 1997 – which application for relief was denied by the District Court on September 9, 1997. Fifty days later, the petitioner then filed a second pro se application for post-conviction relief in state court, after which undersigned counsel enrolled and filed a motion to convert the pro se application to an out-of-time appeal.

On September 24, 1999, the Louisiana Sixteenth Judicial District Court granted relief on Petitioner's application seeking an out-of-time appeal – granting petitioner another chance at the direct appeal rights he had been denied through his constitutionally ineffective counsel. On February 16, 2001, the Louisiana First Circuit Court of Appeal conditionally affirmed but remanded to the trial court to determine if Lee's trial counsel was ineffective because of a conflict of interest, among other things (See App. 4). On June 24, 2003, the trial judge, Judge deMahy, granted petitioner a new trial based on the constitutional denial of effective assistance of counsel and presentation of new evidence (See App. 3). During hearings at the trial court level, the trial court learned and ruled that Colwart not only initially represented the main witness against Lee, but Colwart had told the witness Coslow to lie to make him a better witness. Then,

Colwart began representing Lee and did not confront Coslow on the lies he, Colwart, had coached Coslow to tell. Based on this, and the fact that Coslow admitted to Judge deMahy that he lied in Lee's trial about the drugs he took before the murder and who committed the murder, Judge deMahy granted Lee a new trial. This was the same trial judge who had heard the trial and sentenced Lee to life in prison. The State proceeded to take a writ opposing the grant of a new trial. The Louisiana First Circuit Court of Appeal, who had conditionally affirmed the out-of-time appeal, now overruled Judge deMahy and said, without reason, that Lee should not get a new trial. This direct appeal process ended when the Louisiana Supreme Court denied Mr. Lee relief on November 24, 2004. Taking the out-of-time appeal as a reinstatement of his direct appeal, his state court judgment became final for 28 U.S.C. § 2244(d) purposes 90 days later, on February 22, 2005.

Mr. Lee then filed a petition for post-conviction relief in the state courts on November 22, 2005, 273 days later. The state collateral action continued in a timely manner, tolling the 28 U.S.C. § 2244(d) clock, until the Louisiana Supreme Court denied Mr. Lee relief on his post-conviction action on May 11, 2007.

Prior to the conclusion of the state court action, on February 23, 2007, Petitioner simultaneously filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 and a Motion to Hold Habeas Corpus Petition in Abeyance in the Western District of Louisiana. On May 18, 2007, seven days after the conclusion of the

state court action, the United States Court for the Western District of Louisiana granted a withdrawal of Petitioner's Motion to Hold Habeas Corpus Petition in Abeyance. At the time of the federal habeas corpus filing, the petition at issue, 280 days of un-tolled time had run since Mr. Lee's state court judgment had become final – February 22, 2005.

On June 1, 2007, the magistrate judge recommended that the habeas corpus petition be denied and dismissed with prejudice, suggesting that the claims were barred by the one-year limitation period of 28 U.S.C. § 2244(d). The Magistrate Judge included in the 28 U.S.C. § 2244(d) time calculation the 281 days that had lapsed un-tolled before the reinstatement of Mr. Lee's direct appeal rights, and before Mr. Lee's direct review was final in the Louisiana Courts on February 22, 2005. On June 26, 2007, Petitioner filed a Response & Objection to the Report and Recommendation of the Magistrate Judge. On June 28, 2007, the United States Court for the Western District of Louisiana denied and dismissed with prejudice the habeas corpus petition of Danny Ray Lee, adopting the recommendation of the magistrate judge.

Petitioner, through undersigned counsel, filed a Notice of Appeal on June 28, 2007; and a Motion to Proceed on Appeal *In Forma Pauperis* on July 10, 2007. On July 11, 2007, the United States Court for the Western District of Louisiana granted the Motion to Proceed on Appeal *In Forma Pauperis* and denied Petitioner's proposed Certificate of Appealability,

citing a failure to demonstrate a substantial showing of the denial of a constitutional right. This decision was appealed to the U.S. Court of Appeals for the Fifth Circuit, where the petition for a certificate of appealability was denied on March 25, 2008, for, as the court stated, "Lee failed to demonstrate that reasonable jurists would find it debatable whether the district court was correct in its procedural ruling."

Mr. Lee now comes before this court asking that the certificate of appealability be granted in the U.S. Court of Appeals for the Fifth Circuit, where Mr. Lee has met his burden under 28 U.S.C. § 2253(c); first, in making a substantial showing that he has been denied a Constitutional right; and second, that reasonable jurists, the other U.S. Circuit Appeals Courts in particular, have disagreed on the application of the procedural rule under which he was denied.

ARGUMENT

Danny Ray Lee was denied his Constitutional right to effective assistance of counsel, according to the standard defined in *Strickland v. Washington*, when Lee's attorney in his second-degree murder trial, Mr. Craig Colwart, (1) previously represented the co-accused during a preliminary hearing and negotiated a plea for him to testify against Lee, and then began representing Lee in the murder case where his former client was the chief witness against Lee. 466 U.S. 668 (1984). The co-accused was also the

only eyewitness to the crime. (2) Mr. Colwart failed to prepare properly for the defense of Petitioner and failed to discover crucial evidence, namely a letter written to the Petitioner by the co-accused and his former client which stated that the co-accused testified falsely at the trial as to which one of them had committed the crime. Colwart did not have an opportunity to receive this piece of evidence because he failed to visit the Petitioner or meet with him to prepare a defense. Colwart also failed to interview the state's key witness, the same co-accused he had previously represented. He also did not cross examine the co-accused about the lies the he told because Colwart had instructed the co-accused to lie in the trial of Danny Ray Lee, Colwart's new client. (3) Colwart failed to file a brief in support of Petitioner's appeal, and failed to inform Petitioner that the appeal had been abandoned.

The procedural issue, and the grounds upon which the U.S. Court of Appeals for the Fifth Circuit denied Mr. Lee's petition for a certificate of appealability, is whether jurists of reason would find it debatable whether the district court was correct in its procedural ruling, when it denied as time-barred Danny Ray Lee's petition for *habeas corpus*, under the one-year limitation period of the Antiterrorism and Effective Death Penalty Act [28 U.S.C. § 2244(d)].

The District court held that the one-year clock started 30 days after Lee was first convicted – September 19, 1996. Mr. Lee asserts that 90 days after the conclusion of direct review granted through the

out-of-time appeal by the District Court is actually the correct date of the conclusion of his direct appeal – on February 22, 2005. Petitioner asserts that the procedure in question, out-of-time grant of a direct appeal, is specifically an issue that the different United States Circuit Courts of Appeal have treated inconsistently, even in respect to essentially the same factual bases. As such, a certificate of appealability should have been issued on the ground that reasonable jurists *have in fact debated* in their interpretation of this particular procedural issue.

A. Actual Time Line of Danny Ray Lee's Appeal Process

Petitioner's direct appeal from the judgment of the trial court was abandoned by his lawyer at the time, Craig Colwart, the same lawyer who represented the witness against Lee and negotiated the plea bargain to testify against Lee. After filing for an extension of the time for appeal, Mr. Colwart did not file a brief and did not inform his client of the state of his case. The First Circuit Court of Appeals conducted a patent error review and affirmed petitioner's conviction on August 19, 1996.

The petitioner filed a pro se application for post-conviction relief in the Sixteenth District Judicial Court on May 7, 1997. This action was taken at the time that the petitioner found out that his case had not been properly handled by his counsel – 231 days passed between the original final judgment date and

the petitioner's pro se filing with the District Court – a tolling event. This first application for relief was denied by the District Court on September 9, 1997.

The petitioner then filed a second pro se application for post-conviction relief on October 29, 1997 – 50 days later. After the second filing and before the court decided the issue, the current counsel, Mr. James Boren, began representing the petitioner and moved for an out-of-time appeal in the District Court. On September 24, 1999, the Louisiana Sixteenth Judicial District Court granted relief on Petitioner's application seeking an out-of-time appeal – granting petitioner another chance at the direct appeal rights he had been denied through his constitutionally ineffective counsel. This direct appeal ended when the Louisiana Supreme Court denied Mr. Lee relief on November 24, 2004. Taking the out-of-time appeal as a reinstatement of his direct appeal, his state court judgment became final for 28 U.S.C. § 2244(d) purposes 90 days later, on February 22, 2005.

Mr. Lee then filed a petition for post-conviction relief in the state courts on November 22, 2005, 273 days of un-tolled time had elapsed. The state collateral action continued in a timely manner, tolling the 28 U.S.C. § 2244(d) clock, until the Louisiana Supreme Court denied Mr. Lee relief on his post-conviction action on May 11, 2007.

Prior to the conclusion of the state court action, on February 23, 2007, Petitioner simultaneously filed a Petition for Writ of Habeas Corpus under 28 U.S.C.

§ 2254 and a Motion to Hold Habeas Corpus Petition in Abeyance in the Western District of Louisiana. On May 18, 2007, seven days after the conclusion of the state court action, the United States Court for the Western District of Louisiana granted a withdrawal of Petitioner's Motion to Hold Habeas Corpus Petition in Abeyance. At the time of the federal habeas corpus filing, the petition at issue, 280 days of un-tolled time had run since the Mr. Lee's state court judgment had become final -- February 22, 2005.

B. Effect of Danny Ray Lee's Out-Of-Time Appeal

In order for the judgment to be final, the process of direct review must be complete. Petitioner asserts that direct review of the judgment was not complete until February 22, 2005; 90 days after the decision to deny the writ of certiorari by the Louisiana Supreme Court. *See Roberts v. Cockrell*, 319 F.3d 690 (5th Cir. 2003) (where the Louisiana Supreme Court held that, " . . . the 'conclusion of direct review' is when the Supreme Court either rejects the petition for certiorari or rules on its merits. [W]e previously held that this includes the ninety days allowed for a petition to the Supreme Court following the entry of judgment by the state court of last resort"). Even though the initial period for direct review seemingly ended when the original lawyer did not file a brief in appeal to the District Court; when the Court granted an out-of-time appeal it reinstated the right to appeal and reinstated direct review of the conviction. The phrase,

'reinstating the right to appeal,' is used by the Louisiana Supreme Court in *State v. Counterman* to explain the nature of the grant of an out-of-time appeal. 475 So.2d 336, 338 (La. 1985).

The Louisiana Supreme Court in *Cockerham v. Cain*, defines when a Louisiana conviction becomes final for purposes of Louisiana law. 283 F.3d 657, 661 (5th Cir. 2002). The Court held that,

> courts [should] treat out-of-time appeals the same as timely filed appeals, thus entitling these defendants to the benefit of rules established before the out of time appeal was resolved.

Id.

C. Jurists of Reason In Fact Debate Whether An Out-Of-Time Appeal Mechanism Restarts the Direct Review of a Conviction

It is clear from the different Circuit Courts of Appeal that reasonable jurists debate on the specific procedural ruling of the District Court in this case. The federal courts of appeal decisions can be parsed in many ways; the question of whether the A.E.D.P.A. classification of 'direct review' rests on state law interpretation or federal law application; whether the person in question ever had an opportunity for direct review; whether he lost that opportunity through no fault of his own; whether to define the nature of the out-of-time appeal by the procedural mechanism used to access the relief or the manner in which it proceeds

after access; and finally how the state actually defines the resulting procedure.

Looking at the different decisions of the courts of appeal, there is a split on whether the state characterization of the out-of-time appeal procedure is determinative, or rather if the federal court should examine the nature of the procedure and make a federal determination thereon. But a categorization of the Courts of Appeal with these terms alone would not give a firm indication of how the courts would decide a case. In fact, given a set of factors involved in the different cases and circuits, there is no clear indication that any particular issue is determinative (see chart at App. 5).

D. Federal Determination – Fifth Circuit, Sixth Circuit and Ninth Circuit

The Fifth Circuit Court of Appeals has recognized, in *Salinas v. Dretke* that an application for an out-of-time Petition for *Discretionary* Review (PDR) in the Texas law, is a post-conviction procedure, and therefore collateral in nature. 354 F.3d 425 (5th Cir. 2004). In *Salinas*, this Court examined the effect of a right to file an 'out-of-time' PDR as it applied under Texas law, and found that the collateral mechanism did not reinitiate the direct review process – despite the repeated contention in the state jurisprudence that the person was returned to the position of a recently convicted defendant. *See Ex Parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997) ("granting

an out-of-time appeal restores the pendency of the direct appeal); *and also Ex Parte Daigle*, 848 S.W.2d 691, 692 (Tex. Crim. App. 1993) (returns a petitioner, "to the point at which he can give notice of appeal.").

The Court reasoned in *Salinas* that the inquiry was not whether the person was returned to 'direct review' status; but that the important issue was the "mechanism by which Salinas obtained the right to file an out-of-time PDR," was collateral in nature. 354 F.3d at 430. The Court held that the A.E.D.P.A. clock was tolled during the out-of-time appeal, but not restarted as a result; because, as the Court defined it, the one-year limitation in the A.E.D.P.A. is 'linear' only and does not allow for a re-starting under any circumstances.

The Sixth Circuit Court of Appeals used essentially the same reasoning in *Lopez v. Wilson* to determine whether a prisoner had a right to counsel during the application for an out-of-time appeal in Ohio (Rule 26(B) application to reopen). The Court determined that Ohio Rule 26(B) was a collateral mechanism, under an interpretation of that procedure in the A.E.D.P.A. framework. 426 F.3d 339 (6th Cir. 2005). The court held that the Rule 26(B) application is a collateral proceeding, and should not restart the A.E.D.P.A. one year limitations clock. The court stated that the Rule 26(B) application can be filed at any time after a final judgment; there is no time limitation in the Ohio law for filing this particular relief, as the court stated, "[a]llowing that statute to be restarted at the convenience of the prisoner

would defeat that purpose [of the A.E.D.P.A.]." *Id.* at 352.

Lastly, the Ninth Circuit used the federal determination reasoning in *Summers v. Schriro* to reach the opposite result. 481 F.3d 710 (9th Cir. 2007). At issue here was Arizona's Rule 32 'of-right' proceeding, where a person pleads to a felony and has not had a 'first round' of direct appeals, but is able to file for the appeal out of the normal time allotted for such action (out-of-time appeal of a plea). The Ninth Circuit reasoned that the *function* of the proceeding in the state was determinative and not the *characterization*, eventually coming to the conclusion that the 'of-right' proceeding was 'direct' in nature. *Id.* at 714. Again, the Court relied on the state law only insomuch as it was an indication of how the proceeding actually functioned, and not what is was called. The Court held that Summers' right to file a federal *habeas corpus* petition did not lapse under the A.E.D.P.A. until after the direct review resulting from his Rule 32 proceeding was complete. *Id.* at 717.

The Ninth Circuit has also ruled otherwise in relation to the same Rule 32 proceeding, except in the case that followed, *Hemmerle v. Schriro*, the Court distinguished the defendant therein because he had enjoyed a round of direct appeal. The Court held,

> Hemmerle did not enter a guilty plea which would have forfeited his right to direct appeal. Hemmerle was convicted after a jury trial and was entitled to, *and had*, a full round of direct review. Thus, his Rule 32

> proceedings were not "of right" and are treated as collateral review for A.E.D.P.A. purposes (emphasis added).

2007 WL 2050945 (9th Cir. 2007).

In each of these decisions the Federal Courts have proclaimed to look to the state law not as a determinative factor, but rather as a guide to the nature of the proceeding.

E. State Characterization - Fourth Circuit, Eighth Circuit and Tenth Circuit

The Court of Appeals for the Fourth Circuit held in, *Frasch v. Peguese*, in order to, "determine what constitutes 'direct review' for purposes of 2244(d)(1)(A), we look to state (Maryland) law." 414 F.3d 518, 522 (4th Cir. 2001). The Court found that the *mechanism* for obtaining the right to an out-of-time appeal was collateral in nature, but the *proceeding* that followed was a part of the direct review process – specifically rejecting the approach of the Fifth Circuit in *Salinas*, because as the Court cited, the proceedings are separate. *Id.* at 522. The Court relied not on its determination of the nature of the state procedure, but rather on how the state treated the procedure that followed the granting of the out-of-time appeal.

> The nature of the review engaged in by the Court of Special Appeals is the key to determining whether the review was direct or collateral, and it is Frasch's procedural posture *in that court after he was allowed to file the*

> *application* that is a factor in determining the nature of review (emphasis in original).

Id. at 524.

In this proceeding under Maryland law, after Frasch's application was granted he was; (1) granted a new finite deadline [30 days] for seeking review; (2) he was not restricted to challenging his conviction in one of the four types of claims available under the Maryland Uniform Post-conviction Procedure Act, but rather had the full measure of appellate review at his disposal; (3) the available decision options of the Court of Special Appeals was the same as if Frasch had filed by the original deadline; and (4) finally after being denied his direct appeal, he was able to pursue a full collateral proceeding without facing the successive bar to post-conviction proceedings of someone who had already filed and received post-conviction relief. *Id.* at 522-525.

In examining the procedural posture, the Fourth Circuit followed the reasoning in *Orange v. Calbone*, where the Tenth Circuit made a similar determination based on a similar set of factors used in the *Frasch* decision. 318 F.3d 1167 (10th Cir. 2003). The Court in *Orange* specifically states that the determination of whether a state procedure is 'direct' for purposes of the A.E.D.P.A., " . . . a federal court must defer to underlying state court characterization of procedure." *Id.* at 1170. The Court does not give up its ability to interpret the application of federal law to this case; it merely looks to the manner in which the

state court defines its proceeding, and the manner in which the person proceeds therein.

The Court looks at substantially the same four indices as the *Frasch* court; (1) new finite period for filing – ten days granted in *Orange*; (2) the type of pleadings/claims available – a full merits review in *Orange*; (3) the position of the person as appellant, as opposed to petitioner; and the decision from the court styled as 'affirmed' or 'reversed', typical of a direct appeal; and (4) lastly, the full range of post-conviction relief still available despite the procedural bar to successive petitions. *Id.* at 1171.

The Court also makes an additional distinction within the Oklahoma law, the out-of-time appeal can either be direct, in the case that the defendant had been denied a direct appeal through no fault of his own, or collateral. In *Orange*, the defendant qualified for a direct out-of-time appeal and the Court held that the § 2244(d)(1)(A) clock did not start until this direct appeal was complete. The distinction is important because the Court can answer one of the challenges to this A.E.D.P.A. ruling, that somehow affording those who are granted an out-of-time appeal rights to federal *habeas corpus* proceedings undermines the intent of the law. It has been stated that the purpose of the A.E.D.P.A. is to, "further the principles of comity, finality and federalism." *Williams v. Taylor*, 529 U.S. 420, 436 (2000). It is not a threat to the 'finality' purpose of A.E.D.P.A. to allow in very limited circumstances, where a state court finds that a person has been denied a right of direct appeal, the

time limitation of § 2244(d) to restart – congruent with the actual finality of the state court judgment.

F. The Louisiana Law Analysis and *Lee v. Cain*

The factors considered by each of the Circuits in determining whether or not the proceeding are direct or collateral are simple questions of procedure. This examination by the Circuit Courts is necessary, as this Court has instructed in *Carey v. Saffold*, that the proper manner to apply "a federal statute that interacts with state procedural rules [is to] look to how a state procedure functions, rather that the particular name that it bears (citations omitted)." 536 U.S. 214, 223 (1999). The factors to determine whether or not the review is direct in nature are; (1) a new finite time for filing an appeal; (2) nature of the claims available; (3) other concurrent proceedings available; (4) right to counsel during the proceedings; (5) the nature of the decisions available; and (6) the nature of the available procedures that follow.

We are left to look at the Louisiana law and determine whether the proceeding following a grant of an out-of-time appeal specifically comports with a direct or collateral procedure, following the factors used by the Circuit Courts: (1), the granting of an out-of-time appeal in Louisiana results in a finite time to file the appeal in the appellate court; (2), in the proceeding following a grant of an out-of-time appeal, the Louisiana defendant is in the same procedural posture as that of a direct appeal, and only in

exceptional circumstances may offer new evidence; (3), as the out-of-time appeal is granted in the Louisiana courts, any concurrent collateral attacks must be dismissed, as the judgment is treated as no longer final for the purpose of a post-conviction action; again, the Courts treat the proceedings as a direct attack on a *non-final judgment*; and (4), the accused has a right to counsel during the reinstated appeals process in Louisiana. The right to counsel after an out-of-time appeal is not an exception to the Constitution, but rather a practice consistent with the Sixth Amendment right to counsel during the direct review process. *Counterman*, 475 So.2d at 340.

Danny Ray Lee's right to appeal was reinstated through an out-of-time appeal; the nature of the procedure that followed was direct and not collateral. The Louisiana Supreme Court in *Counterman* interprets the 'grounds' for relief provision of the Louisiana Code of Criminal Procedure, Art. 930.3, and holds that it,

> . . . does not expressly provide for the specific form of relief to be granted . . . the court arguably has the inherent authority to grant the limited relief of an out-of-time appeal (as opposed to the usual relief of a new trial in successful post conviction applications). Moreover, the spirit of Article 930.3(1) . . . also entitles the applicant to the more limited relief of reinstatement of his right to appeal . . .

Id. In the Louisiana law, the motion for an out-of-time appeal is a collateral attack on the judgment precisely

because it is a motion against a final judgment. However, the appeal rights reinstated upon a grant of a motion for an out-of-time appeal is a separate proceeding from the post-conviction relief, the nature of which is a direct attack on the judgment from the lower court.

In *Counterman*, the Louisiana Supreme Court addressed the nature of the Louisiana law regarding out-of-time appeals and held that,

> the appropriate procedural vehicle for a defendant to seek the exercise of his right to appeal, after the delay provided in Article 914 has expired, is an application for post conviction relief pursuant to Articles 924-930.

475 So.2d at 339 (La. 1985). Stating in a footnote referencing this quote,

> when the time for appealing has elapsed without the filing of an appeal, defendant may seek *reinstatement of his right to appeal* by application for post conviction relief in the trial court. [emphasis added]

Id. at Fn. 4.

Using either of the prevailing means to define the manner of A.E.D.P.A. interpretation, state characterization or federal court determination, under the Louisiana law, the proceedings following an out-of-time appeal are without question direct in nature. Under the state characterization analysis, it is clear that the reinstatement of appellate rights under the

Louisiana law, allowed by the grant of an out-of-time appeal, is a direct appeal of the non-final judgment of the trial court. Under the federal court determination analysis, it is clear that the geographic circuit in which Lee was denied his constitutional right to effective assistance of counsel, would be the determining factor in whether he was granted federal habeas corpus relief – a clearly unconstitutional outcome. The § 2244(d) clock should start over on the reestablishment of direct appeal rights under the Louisiana law mechanism of an out-of-time appeal.

CONCLUSION

Petitioner was denied his right to a direct appeal through the constitutionally ineffective assistance of his court appointed counsel and was denied a right to file a federal *habeas corpus* petition on the procedural grounds that his petition was time barred under the A.E.D.P.A..

Petitioner applied for and received post-conviction relief in the form of a reinstatement of his direct appeal rights, an out-of-time appeal, which placed him back in the position he was in when denied these rights in the first place. On this direct appeal, the appellate court conditionally affirmed but remanded to determine if Lee received effective assistance of counsel. The trial court determined his representation was shockingly ineffective – his lawyer represented the witness against him, negotiated a

deal for the witness to testify against Lee, coached the witness to lie, and did not cross examine his former client on any of these matters. Plus, the witness admitted he lied at the trial. The trial court granted a new trial which the state then appealed and the new trial was lost.

Reasonable jurists have differed on the very same procedural issue present in this case, and the Fifth Circuit Court of Appeals mistakenly refused Petitioner a certificate of appealability.

With respect to the stated purpose of the A.E.D.P.A., it follows that a state court ruling on the rare exception of an out-of-time appeal, when the defendant has been otherwise denied a right to direct appeal, would equate to a reinstated right to federal *habeas corpus* relief consistent with other persons similarly situated in the direct appeal process. The United States Supreme Court has stated clearly that the purpose of the A.E.D.P.A. and § 2244(d) is to shut the door on 'abusive delay.' *Pace v. DiGuglielmo*, 544 U.S. 408, 413 (2005). Granting the petitioner a right to federal habeas corpus relief whenever he has been granted an out-of-time appeal, would not serve as an abuse of delay, but rather a fair and equitable interpretation of the purpose of the A.E.D.P.A., and consistent with the due process afforded to the petitioner in the granting of the out-of-time appeal.

For the foregoing reasons, the petitioner, Danny Ray Lee, respectfully requests that this Court instruct the U.S. Fifth Circuit Court of Appeals to issue

a certificate of appealability so that full treatment of the denial of his constitutional right may be presented.

Respectfully submitted,

JAMES E. BOREN
Louisiana Bar Roll No. 03252
830 Main Street
Baton Rouge, LA 70802
Telephone: 225-387-5786

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 07-30659
USDC No. 6:07-CV-339

DANNY RAY LEE

Petitioner-Appellant

v.

BURL CAIN, WARDEN,
LOUISIANA STATE PENITENTIARY

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Louisiana

(Filed Mar. 25, 2008)

ORDER:

Danny Ray Lee, Louisiana prisoner # 353750, was convicted in 1995 of second degree murder and he was sentenced to life in prison. He now seeks a certificate of appealability (COA), arguing that reasonable jurists would debate the district court's dismissal of his 28 U.S.C. § 2254 application as time barred. He also argues the merits of his ineffective assistance of counsel claims.

Lee has failed to demonstrate that reasonable jurists would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). His motion for a COA is DENIED.

/s/ Rhesa H. Barksdale
RHESA H. BARKSDALE
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Danny Ray Lee	**Civil Action 07-339**
versus	**Judge Tucker L. Melancon**
Warden Louisiana State Penitentiary	**Magistrate Judge Methvin**

ORDER

(Filed Jul. 11, 2007)

Before the Court is Petitioner's Affidavit and Motion to Proceed on Appeal *In Forma Pauperis* filed on July 10, 2007 [Rec. Doc. 15] and Proposed Certificate of Appealability [Rec. Doc. 16]. Petitioner's declaration shows no assets. The state of prisoner's account shows that petitioner has a balance of $426.54 on account, that his average monthly deposits are $255.95, and his average monthly balance for the last six months is $146.63. The filing fee for this appeal is $450.00. Therefore, this Court finds that petitioner is a pauper and it is

ORDERED that Danny Ray Lee's Motion to Proceed on Appeal *In Forma Pauperis* [Rec. Doc. 15] is GRANTED.

IT IS FURTHER ORDERED that Danny Ray Lee's Proposed Certificate of Appealability [Rec. Doc. 16] is DENIED because the applicant has failed to demonstrate a substantial showing of the denial of a constitutional right.

THUS DONE AND SIGNED in Lafayette, Louisiana, on this 11th day of July, 2007.

/s/ [Illegible]
Tucker L. Melancon
UNITED STATES DISTRICT JUDGE

STATE OF LOUISIANA
SIXTEENTH JUDICIAL DISTRICT

STATE OF LOUISIANA

VERSUS

DANNY LEE
DOCKET NO. 99-151,291

APPEARANCES:

THOMAS SENETTE Assistant District Attorney St. Mary Parish Courthouse Franklin, LA 70538	COUNSEL FOR STATE
JAMES E. BOREN Attorney-at-Law 830 Main Street Baton Rouge, LA 70802	COUNSEL FOR DEFENDANT DANNY LEE
ROBERT P. FUHRER Attorney-at-Law Indigent Defender Board Franklin, LA 70538	COUNSEL FOR CO-DEFENDANT DAVY COSLOW

TRANSCRIPT OF POST-CONVICTION RELIEF HEARING

(Filed Jul. 28, 2003)

Transcript of all proceedings had and the evidence adduced held in the above numbered and entitled cause on June 24, 2003, the Honorable Paul J. deMahy, Presiding Judge.

* * *

[90] **BY THE COURT:**

I have reviewed the transcript of the trial, pages – the page number, I'm going to refer to is the record page number, not the transcript page number. 413 through 423, some of which deals with the cross examination of Davy Coslow regarding the use of drugs. Initially, he denies using any drugs, then he admits they smoked Marijuana. He denies even knowing that there was any Crank or Crystal Meth, which is the two names for the same drug, were present at any time during the trip. The testimony today by Mr. Coslow is that he told Mr. Colwart about them using Marijuana and Crystal Meth. And Mr. Colwart, although his memory was somewhat sketchy, seemed to recall that he received that information from Mr. Coslow regarding the use of Marijuana and Crystal Meth. And, since he received that information as Mr. Coslow's attorney, he could not confront Mr. Coslow with a prior [91] inconsistent statement regarding the use of Crystal Meth or Crank during the trip, or at the time of the murder. This would, of course, challenge the credibility of Mr. Coslow at trial. And the two witnesses, eyewitnesses, more or less, against Mr. Lee were Mr. Coslow and Mrs. Coslow, and the primary witness being Mr. Coslow who testified that he saw the entire incident. A successful attack on the credibility of Mr. Coslow could affect the outcome of the case. So, I'm going to find that Mr. Colwart's conflict had an adverse impact on the representation of Danny Lee and will grant his motion for a new trial.

I will order Mr. Lee held on a bond of $1,000,000.00 pending the appeal of this decision, and future trial, if necessary.

BY MR. SENETTE:

Your Honor, I'm not entirely sure what the course of action the State would take with regard to whether this is still in the appellate process or whether we would have to file a writ.

BY THE COURT:

Whichever you intend to do. All right. That's what I expect, that the State will either file a writ or an appeal, and that's why I have set the bond pending whatever appeal or retrial occurs.

By granting the new trial, I, in effect, vacate the sentence and previous conviction.

BY MR. SENETTE:

Your Honor, the State moves for a stay of the court's order concerning the respective date of the motion for a [92] new trial.

BY THE COURT:

I will grant a 30 day stay of my order to allow the State to prepare an appeal or writ, whichever is appropriate.

(END OF PROCEEDINGS)

---

788 So.2d 452

Court of Appeal of Louisiana, First Circuit.
STATE of Louisiana
v.
Danny Ray LEE
No. 2000 KA 0183.

Feb. 16, 2001.
Writ Denied March 30, 2001.

Walter J. Senette, Jr., Assistant District Attorney, Franklin, for Appellee State of Louisiana.

James E. Boren, Baton Rouge, for Appellant Danny Ray Lee.

Before: CARTER, C.J., FOIL and WEIMER, JJ.

FOIL, Judge.

Defendant, Danny Ray Lee, was charged by indictment with second degree murder, a violation of La. R.S. 14:30.1. After pleading not guilty, he was tried by jury and convicted as charged. He received the mandatory sentence of life in prison at hard labor without probation, parole or suspension of sentence. Defendant appealed, urging two assignments of error.

FACTS

In August, 1994, defendant and three other people, Davey Coslow, Sherry Coslow and Sheila Tibblas, left Oklahoma in a car rented by Tibblas, with the intention of visiting all of the states in the country. Davey and Sherry Coslow were husband and

wife. Defendant and Sheila Tibblas were boyfriend and girlfriend.

While the group was in St. Mary Parish, they stopped at a sugarcane field. According to Davey Coslow, defendant murdered Tibblas while they were at the sugarcane field. Coslow said that defendant first choked her and then stabbed her in the throat. The victim's body was then covered with a piece of old tin and left in a trash pile in the field.

Defendant and the Coslows then continued on the trip, using the victim's checks, forged by Sherry Coslow, to finance their travels. Eventually they returned to Oklahoma where they were stopped for a traffic violation. At the time of the stop, they were still driving the victim's rental car. Police noted that the person to whom the car had been rented had been reported missing and was not in the car when it was stopped. Initially, defendant was arrested only for driving without a license, and Davey Coslow was arrested for possession of marijuana. Sherry Coslow and another woman who was in the car at the time of the stop were released.

Shortly after her release, Sherry Coslow contacted Oklahoma police and told them about the murder of Tibblas. Eventually, Davey Coslow cooperated with police in Oklahoma and told them that defendant had murdered Tibblas. He was taken to Louisiana where he assisted police in locating the victim's body.

ASSIGNMENT OF ERROR NO. 2

In this assignment of error, defendant claims that the trial court's instruction on second degree murder was erroneous in that it failed to include the element of specific intent. He further claims that trial counsel was ineffective for failure to object to the instruction.

La.Code Crim. P. art. 801 dictates that, "[a] party may not assign as error the giving or failure to give a jury charge or any portion thereof unless an objection thereto is made before the jury retires or within such time as the court may reasonably cure the alleged error." Here, the defendant argues that trial counsel's failure to object to the jury charge constitutes ineffective assistance of counsel.

We note initially that a claim of ineffective assistance of counsel is more properly raised by an application for post conviction relief in the district court where a full evidentiary hearing may be conducted. *State v. Hicks*, 554 So.2d 1298, 1306 (La.App. 1st Cir.1989), *writs denied,* 559 So.2d 1374 (La.1990) and 604 So.2d 1297 (La.1992). However, where the record discloses evidence sufficient to decide the issue of ineffective assistance of counsel and that issue is raised on appeal, the issue may be addressed in the interest of judicial economy. *State v. Bourgeois,* 451 So.2d 172, 174 (La.App. 1st Cir.), *writ denied,* 457 So.2d 18 (La.1984). Because defendant has alleged that trial counsel was ineffective for failing to object to the jury charge and the record is sufficient to

review that claim, we will examine the issue of whether the charge was erroneous.

The trial court's instruction defining the crime of second degree murder was as follows:

> Second Degree Murder is the killing of a human being when the offender actively desired to kill or inflict great bodily harm. What Mr. Lee actively desired must be determined in light of ordinary circumstances. It is a question of fact which may be inferred from the circumstances.
>
> So, in order to convict Mr. Lee of Second Degree Murder, you must find that: (1) Danny Lee killed Sheila Tibblas or was a principal in her killing; and (2) He actively desired to kill or inflict great bodily harm.

Defendant points out that the jury instruction regarding the definition of second degree murder did not indicate that the jury had to find that defendant acted with "specific intent" to kill or inflict serious bodily injury. He contends that this omission relieved the state of the burden of proving an element of the offense charged. Defendant asserts that the court's definition creates a crime of "strict liability murder" by effectively eliminating the requirement of specific intent from the definition of the crime.

We disagree. While the words "specific intent" were not used to describe that element of the crime, the definition of specific intent was included in the charge. La. R.S. 14:10(1) defines specific intent as

"that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." The jury was instructed that, in order to find defendant guilty of the crime of second degree murder they must find that he "actively desired to kill or inflict great bodily harm."

Defendant contends that "state of mind" is subjective, while "actively desired" does not refer to state of mind and is objective, rendering the jury instructions defective. He further argues that the omission of the state of mind requirement is not harmless error because the crux of his defense was that he did not have specific intent to kill.

We conclude that the jury instruction complained of here was not erroneous in that it included the definition of specific intent, which is a required element of the crime of second degree murder. Therefore, trial counsel was not ineffective for failing to object to the jury instruction and this assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 1

In this assignment of error, defendant contends that trial counsel was ineffective because of a conflict of interest between his representation of defendant at trial and his prior representation of Davey Coslow, who testified against defendant at trial.

Defendant was indicted for second degree murder. Davey Coslow was charged by bill of information with the crime of accessory after the fact to second degree murder. At all times, the two cases proceeded separately, except at the preliminary hearing when the cases were consolidated for purposes of that hearing only. At the preliminary hearing, both Coslow and defendant were represented by appointed counsel. Craig Colwart of the St. Mary Parish Indigent Defender Board represented Coslow, and Gary LeGros represented defendant. The minutes indicate that, at subsequent proceedings, defendant was represented by Susan E. Kutcher. At trial, defendant was represented by Craig Colwart and Coslow was represented by Gary LeGros.

Defendant filed a motion for an out-of-time appeal, which was granted by the trial court. He then filed a motion for designation of the record, asking that the district court designate the companion case involving Coslow as part of the record on appeal. The district court granted this request. After the record was lodged, appellate counsel noticed that the requested portions of the Coslow case were not included in the appellate record. Defendant filed a motion to supplement the record, this court issued a show cause order, and the parties filed briefs on the motion. Defendant alleged that portions of the Coslow record were needed in order to adequately raise the issue of ineffective assistance of trial counsel based on a conflict of interest between counsel's representation of defendant and his prior representation of Coslow. In

an unpublished decision, *State v. Lee,* 00-0183 (La.App. 1 Cir. 5/5/00), this court found that, in accordance with *State v. Johnson*, 529 So.2d 466, 473 n. 4 (La.App. 1st Cir.1988), *writ denied,* 536 So.2d 1233 (La.1989) and La.Code Crim. P. art. 914.1, it had no authority to receive or review evidence not contained in the trial court record. This court added that even if the record was supplemented as requested, it would not be sufficient to resolve the issue of ineffective assistance of counsel. Such an issue is generally referred to post-conviction proceedings in which, if necessary, both parties can introduce evidence and the validity of the claim can be properly determined. Accordingly, defendant's motion to supplement the record was denied.

Multiple representation does not presumptively result in the ineffective assistance of counsel so as to violate constitutional guarantees unless it gives rise to a conflict of interest. *State v. Castaneda*, 94-1118, p. 11 (La.App. 1 Cir. 6/23/95), 658 So.2d 297, 305. Where there has been no objection to the multiple representation prior to or during trial, defendant must "establish that an actual conflict of interest adversely affected his lawyer's performance" in order to establish a claim of ineffective assistance of counsel in violation of the Sixth Amendment. *Id.,* citing *Cuyler v. Sullivan,* 446 U.S. 335, 350, 100 S.Ct. 1708, 1719, 64 L.Ed.2d 333 (1980). The mere "possibility" of conflict is insufficient to impugn a criminal conviction; defendant must show that counsel actively represented conflicting interests. A defendant who

shows that a conflict of interest actually affected the adequacy of counsel's representation need not demonstrate prejudice in order to obtain relief. *State v. Castaneda,* 94-1118 at pp. 11-12, 658 So.2d at 305. In *Castaneda*, this court held that actual conflicts of interest that adversely affect counsel's performance must be established by specific instances in the record, and the mere possibility of divided loyalties is insufficient proof of actual conflict.

In the instant case, the record reveals that defendant's trial counsel represented Coslow at the preliminary hearing in which police officers and Sherry Coslow gave evidence. The testimony presented detailed the police investigation into the circumstances surrounding the murder of Sheila Tibblas. The officers and Mrs. Coslow gave information about the statements of Davey Coslow implicating defendant in the victim's death. Mr. Colwart, Coslow's attorney at the hearing, conducted a very brief cross-examination of the state's witnesses and presented testimony of one of the investigating officers from Oklahoma regarding the facts surrounding the discovery of the murder. Neither defendant nor Davey Coslow testified at the preliminary hearing.

Clearly the situation in the instant case gives rise to the possibility of an actual conflict. The fact that defendant and Coslow would present antagonistic defenses was recognized on the record by both defense counsel and the state after the preliminary hearing, and a joint request for severance of the trials was granted. However, without an evidentiary

hearing there is no way to evaluate the propriety of counsel's failure to raise the issue of a potential conflict, of which he was obviously aware, prior to trial. Further, it cannot be determined whether such conflict was waived. As noted previously, ineffective assistance claims are generally relegated to application for post-conviction relief in the trial court, wherein an evidentiary hearing could be conducted. In this case, however, we believe the interest of justice and judicial economy will best be served by resolving the issue at this time. Therefore, we remand the case to the trial court for a full evidentiary hearing on the issue.

DECREE

The defendant's conviction and sentence are conditionally affirmed. The case is remanded to the trial court for an evidentiary hearing on the issue of ineffectiveness of counsel due to conflict of interest. If the trial court finds merit to the claims, it should set aside the conviction and grant a new trial. *See State v. Addison*, 94-2745, p. 3 (La.6/23/95), 657 So.2d 974, 975; *State v. Lemon,* 29,587, 29,588, p. 12 (La.App. 2 Cir. 8/20/97), 698 So.2d 1057, 1064. If the trial court does not find ineffective assistance, defendant may appeal from that ruling. In the absence of such an appeal, the conviction and sentence will be affirmed.

CONVICTION AND SENTENCE CONDITIONALLY AFFIRMED; REMANDED, WITH INSTRUCTIONS.

WEIMER, J., concurs with reasons. WEIMER, J., concurs.

This remand is dictated by the Rules of Professional Conduct of the Louisiana State Bar Association and the circumstances surrounding the representation of the defendant and one of his accusers.

Rule 1.7 of the Rules of Professional Conduct provides:

> Loyalty is an essential element in the lawyer's relationship to a client. Therefore:
>
> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
>
> (1) The lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) Each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless:
>
> (1) The lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) The client consents after consultation. When representation of multiple

> clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Rule 1.9 of the Rules of Professional Conduct provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> (a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
>
> (b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

Two appointed attorneys, representing the defendant and one of his accusers, switched clients between the preliminary examination and the trial. The trial attorney for the defendant, having represented his accuser earlier in the proceeding, could not help but have divided loyalties. *See* Rule 1.7. The State acknowledges in brief the "record establishes that trial counsel was compelled to cross-examine a state's witness who was a former client[.]" The

defendant's former attorney, with whom he had a relationship of confidentiality,[1] subsequently represented his accuser. At trial, the defendant's attorney is his accuser's former attorney.

The defendant has a right to urge his arguments regarding his attorney's representation in a hearing following the filing of a request for post conviction relief. LSA-C.Cr.P. art. 924 *et seq.* Our remand expedites this hearing to which the defendant is otherwise entitled.

---

[1] *See* Rules of Professional Conduct, Rule 1.6 Confidentiality of information.

	5th Circuit Salinas v. Dretke	6th Circuit Lopez v. Wilson	9th Circuit Summers v. Shriro	4th Circuit Frashe v. Peguese	10th Circuit Orange v. Calbone	8th Circuit O'neil v. Kenny
Federal Law Determination	X	X	X			
State Law Determination				X	X	X
Had Direct Appeal		X				
No Direct Prior Appeal	X		X	X	X	X
Mechanism	X	X				X
Function			X	X	X	
Conviction	X	X			X	
Plea			X	X		X
Granted			X	X	X	
Denied	X	X				X

104

No. 07-1584

FILED
AUG 19 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DANNY RAY LEE,

Petitioner,

v.

BURL CAIN, WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

16th Judicial District
J. PHIL HANEY
District Attorney
WALTER J. SENETTE, JR. 11935
Counsel of Record
Assistant District Attorney
St. Mary Parish
Courthouse Building – Fifth Floor
Franklin, LA 70538
337-828-4100 ext. 550

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) Whether this court should grant this petition, (as it recently did in a similar case, *Jimenez v. Quarterman,* No. 07-6984, 3/17/08, 128 S.Ct. 1646, 170 L.Ed.2d 352) to review the application of *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004) in a Louisiana state law context where the Fifth Circuit denied a Certificate of Appealability to review a federal district court decision holding that when a Louisiana petitioner obtains a state out-of-time direct appeal through the use of the "mechanism" of state post-conviction relief that the granting of the appeal does not restart the one-year statute of limitations clock found in 28 U.S.C. Section 2244(d)(1)(A), but merely suspends the running of the one-year clock pending a decision on the appeal?

(2) Whether the Fifth Circuit erred in denying a Certificate of Appealability to review a decision of the federal district court dismissing Lee's petition as time barred by the AEDPA one-year statute of limitations (28 U.S.C. Section 2244(d)(1)(A) on the grounds that, in accordance with *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004), the granting of an out-of-time appeal does not restart the running of the one-year clock, but merely suspends the running pending the appeal?

(3) Whether there is a significant conflict among the federal circuit courts of appeal on the issue whether an out of time direct appeal restarts the AEDPA one-year clock or merely suspends it pending the appeal?

QUESTIONS PRESENTED – Continued

(4) Assuming that a significant conflict exists on this question is the Fifth Circuit case of *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004) the correct application of federal law on this issue so as to assure federal uniformity in habeas proceedings?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
INTRODUCTION AND SUMMARY OF ARGUMENT IN OPPOSITION	1
ARGUMENT	6
I. APPLICATION OF 28 U.S.C. SECTION 2244(d)(1)(A) ONE-YEAR STATUTE OF LIMITATIONS IN FEDERAL HABEAS CASES TO THIS CASE	6
A. Outline and Analysis of Important Dates and Events Involved in Lee's Direct Appeal and On State and Federal Post-Conviction Relief	6
1. Direct Appeal	7
2. Post-Conviction Relief and Out of Time Direct Appeal in State Court	8
3. Post-Conviction Relief in Federal Court	9
B. Louisiana's Out-of-Time Appeal Jurisprudence and the application of *Salinas*	10
1. Constitutional Right to Direct Appeal	10

TABLE OF CONTENTS – Continued

Page

2. *State v. Counterman* and Out-of-Time Appeal in Louisiana 11

3. *Salinas* 13

4. Application of *Salinas* in Louisiana 14

C. Comparative Analysis of Out-of-Time Direct Appeal Jurisprudence in Federal Appellate Courts 15

1. *Frasch*, (4th), *Orange*, (10th), and *Summers*, (9th) 15

2. *Salinas*, (5th), *Lopez*, (6th), *Teas*, (7th), and *O'Neal*, (8th) 16

D. *Salinas* Is the Correct Resolution of Any Conflict 17

E. Should Writs be Granted in Light of the Writ Grant in *Jimenez v. Quarterman*? 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

STATUTES

28 U.S.C. Section 2244(d)(1)(A) 3, 4, 6, 9

JURISPRUDENCE

Butler v. Cain, 2008 WL 2514644, 6/25/08 14

Cary v. Saffold, 536 U.S. 214 (2002).....17

Duncan v. Walker, 533 U.S. 167, 121 S.Ct. 2110, 150 L.Ed.2d 251 (2001) 18

Evans v. Chavis, 546 U.S. 189 (2006).....17

Frasch v. Peguese, 414 F.3d 518 (4th Cir. 2005).....15, 18

Gilliam v. Jones, 2007 WL 1347807 15

Jennings v. Leger, 2008 WL 2899571 15

Jimenez v. Quarterman, No. 07-6984, 3/17/08, 128 S.Ct. 1646, 170 L.Ed.2d 352 .....4, 19, 20

Lee v. Cain, 2007 WL 1875837 3

Lopez v. Wilson, 426 F.3d 339 (6th Cir. 2005).....15, 16

McGee v. Cain, 104 Fed. Appx. 989 (5th Cir. 2004).....15

McKane v. Durston, 153 U.S. 684 (1894).....10

O'Neal v. Kenny, 2007 WL 2492466.....15, 16, 17

TABLE OF AUTHORITIES – Continued

Page

Orange v. Calbone, 318 F.3d 1167 (10th Cir. 2003) 15, 16

Robinson v. Cain, 2008 WL 821955 15

Salinas v. Dretke, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004) ..... *passim*

Soileau v. Cain, 2005 WL 1629945 15

Sparks v. Hubert, 2008 WL 1746724 15

State v. Counterman, 475 So.2d 336 (La. 1985) 2, 8, 11, 13

Summers v. Schriro, 481 F.3d 710 (9th Cir. 2007) 15, 16

Tapp v. Cain, 2007 WL 2323356 15

Teas v. Endicott, 494 F.3d 580 (7th Cir. 2007) 15, 16

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves the strangulation and throat slitting murder of a young Oklahoma woman traveling through Louisiana on a trip to visit each state in America "wahooing" or stealing gas (pumping gas and driving off without paying for it). Danny Lee and Davey Coslow (who are half brothers) and who were traveling companions of the victim murdered her on September 1, 1999, because they believed she informed the Oklahoma police about their drug activities. The murder was witnessed by the wife of Coslow.

At a preliminary hearing, Lee was represented by Gray Legros of the Indigent Defender's Office (IDO) and Coslow was represented by Craig Colwart, also of the IDO. When the state targeted Lee as the primary defendant in the case, Colwart and LeGros switched clients. LeGros negotiated a plea agreement with the state for Coslow in return for his testimony against Lee at the trial. At trial, both Davey Coslow and his wife testified implicating Lee as the main protagonist in the murder. Colwart filed a timely motion for appeal which was granted by the trial court and the record was lodged with the appellate court.

On appeal Colwart did not assign errors or file a brief. The Louisiana First Circuit Court of Appeals reviewed the record for "patent error" and affirmed Lee's conviction on August 19, 1996. Colwart did not seek writs with the Louisiana Supreme Court within

the 30 day period provide by the Rules of the Louisiana Supreme Court.

On May 7, 1997 Lee filed his first pro se application for post-conviction relief. On September 9, 1997 the trial court denied this first application. On October 29, 1997 Lee filed a second pro se application for post-conviction relief. James Boren, Lee's present attorney, filed a motion to enroll and on a motion to convert Lee's application for post-conviction relief to an out-of-time appeal in accordance with the Louisiana Supreme Court case of *State v. Counterman*, 475 So.2d 336 (La. 1985). On September 24, 1999 the trial court granted Lee's motion for an out-of-time appeal. On February 16, 2001 the First Circuit affirmed Lee's conviction but ordered an evidentiary hearing on the conflict issue. The trial court held the hearing and on June 24, 2003 and granted Lee a new trial finding that Colwart's representation was ineffective due to his inability to adequately cross examine his former client, Coslow, at Lee's trial. The state applied for writs to the First Circuit, which reversed the trial court and affirmed Lee's conviction. Lee applied for writs to the Louisiana Supreme Court which on November 24, 2004 denied writs. Lee did not file a writ with the United States Supreme Court to review the denial of writs by the Louisiana Supreme Court. Almost a year later, on November 22, 2005 Lee filed his third application for post-conviction relief. This third application was denied by the trial court. Lee filed for writs of review with the First Circuit which denied writs. Lee filed for writs with the Louisiana Supreme Court, which denied writs.

Lee also had filed a habeas petition in the Western Federal District Court, State of Louisiana on February 23, 2007 and requested that it be stayed pending the outcome of his writ in the Louisiana Supreme Court. Once the Louisiana Supreme Court denied writs, Lee filed a motion to proceed forward with his federal habeas which was granted on May 18, 2007. The federal district court denied Lee federal habeas relief on June 28, 2007 on the grounds that the one-year statute of limitation period found in 28 U.S.C. Section 2244(d)(1)(A) did not "re-start" and run anew with the granting of the out-of-time appeal citing the Fifth Circuit case of *Salinas v. Dretke*, 354 F.3d 425 (5th Cir. 2004), *cert. denied*, 541 U.S. 1032 (2004). Both the federal district court and the Fifth Circuit denied a certificate of appealability. It is this writ which is before this court, and this is respondent's opposition to the writ.

The one-year clock clearly had run by the time Lee filed his federal habeas petition. See *Lee v. Cain*, 2007 WL 1875837. The only way that Lee's petition would be timely is if the granting of the out-of-time appeal by the state district court somehow restarted a new "direct review" process as that term is used by the AEDPA in 28 U.S.C. Section 2244(d)(1)(A). Hence, the critical and narrow question present in this case is whether the one-year clock started to run anew due to the granting of an out-of-time appeal by the state district court.

The petitioner contends that the granting of the out-of-time appeal in this case by the state district

court on September 24, 1999 restarted the one-year statute of limitation for federal habeas petitions found in 28 U.S.C. Section 2244(d)(1)(A) and that the federal district court erred in finding that the limitation period did not restart and run anew. Lee argues that the use of a "functional analysis" shows that the granting of a new direct appeal should start the one-year clock anew. Finally, Lee contends that a conflict exists among the federal appellate courts concerning the correct method of analysis (functional vs. definitional) to use in deciding whether the one-year clock starts anew or is only suspended during an out-of-time appeal.

Initially, it should be noted that the question of whether there is a sufficient conflict among the circuits to justify the granting of writs in this case may be moot in light of the recent granting of writs in the similar case of *Jimenez v. Quarterman,* No. 07-6984, 3/17/08, 128 S.Ct. 1646, 170 L.Ed.2d 352. As a result, this court may decide to simply wait upon the decision in that case and then either dismiss the petition or remand Lee's petition to the district court for reconsideration in light of the decision in *Jimenez.* On the other hand, this court may want to grant writs in *Lee* and consider the application of *Salinas* in the context of Louisiana's out-of-time appeal procedure.

In any event, the respondent contends that any conflict that exits is, in part, the interpretation of different state statutes and jurisprudence by the federal courts. An analysis of the statutes of the

various states shows that the mechanism for granting a new appeal varies from state to state. This difference shows up as the perceived conflict among the circuits. Further, the respondent contends that, if a serious conflict exists, the federal district court and the Fifth Circuit correctly applied federal law (*Salinas*) to Louisiana's out-of-time appeal procedure in denying a certificate of appealability. This approach finds strong support in the clear intent of Congress in enacting the AEDPA namely, that the time filing federal habeas should be limited. Neither functional of definitional analysis provide an adequate standard for the court to use to determine what is "direct review" for the purpose of federal uniformity. The respondent submits that the standard found in *Salinas* best promotes the intent of Congress in enacting the AEDPA and of finality. Salinas concentrates on the "manner" or "mechanism" in which the review is obtained and not on the function of the review (direct review of all issue or limited review) or on the terms used to define it (direct or collateral). As a result, once the "normal direct review" takes place, the federal AEDPA clock starts to run. While it can be tolled, it cannot be restarted.

ARGUMENT

I. APPLICATION OF 28 U.S.C. Section 2244(d)(1)(A) TO THIS CASE.

A. Outline and Analysis of Important Dates and Events Involved in Lee's Direct Appeal and State and Federal Post-Conviction Relief.

On September 1, 1994 the victim, Sheila Tibblas an Oklahoma resident, and traveling companion of Lee, was murdered by Lee and Coslow in a sugar cane field in St. Mary Parish, Louisiana. She came to be in Louisiana because Danny Lee and two companions, (Davey Coslow and Sherry Coslow) who were husband and wife, left Oklahoma in a vehicle intending to visit all of the states in America stealing (wahooing) gas. Danny Lee and Davey Coslow are half brothers. According to both Davey Coslow and Sherry Coslow, Lee choked the victim and then cut her throat with a knife. Ultimately, Sherry Coslow told the police in Oklahoma about the murder in Louisiana. Davey Coslow also cooperated with the authorities, implicated Lee in the murder and took the police to the location of the body. The motive for the murder was that Lee and Coslow believed that the victim had spoken or would inform on their drug activities to the police in Oklahoma.

Both Davy Coslow and Lee were arrested for the murder. At a preliminary hearing held on November 9, 1994 Lee was represented by Mr. Gray LeGros of the Indigent Defender Office and Coslow was

represented by Mr. Craig Colwart also of the Indigent Defender Office. On Nov. 28, 1994 the defendant, Danny Lee, was charged by way of a grand jury indictment with second degree murder of Sheila Tibblas. On April 3, 1995 he was arraigned and entered a plea of not guilty. The case went to trial before a jury on April 3, 1995. Coslow testified in the trial and implicated Lee in the murder. In return for his testimony, Coslow was allowed to plead to the reduced charge of accessory after the fact and received a 5 year prison sentence.

At the trial Lee was represented by Colwart, the attorney who had represented Coslow at the preliminary hearing. Lee was found guilty of second degree murder and was sentenced to the mandatory sentence of life imprisonment at hard labor.

(1) Lee's First Direct Appeal

Colwart filed a timely motion for appeal, which was granted by the trial court, and the record was lodged with the appellate court. On appeal Colwart did not assign errors or file a brief. The Louisiana First Circuit Court of Appeals reviewed the record for "patent error" and affirmed Lee's conviction on August 19, 1996. Colwart did not seek writs with the Louisiana Supreme Court within the 30 day period provided by the Rules of the Louisiana Supreme Court.

(2) Lee's State Post-Conviction Applications and Out-of-Time Appeal

Lee filed his first *pro se* application for post-conviction relief. This application did not contain any of the grounds concerning ineffective assistance of counsel involving a conflict which he now alleges in this writ. On September 9, 1997 the trial court denied this first application. Lee filed a second pro se application for post-conviction relief. This second application did not contain any of the grounds concerning ineffective assistance of counsel involving a conflict which he now alleges in this writ.

James Boren, Lee's present attorney, filed a motion to enroll and a motion to convert Lee's application for post-conviction relief to an out-of-time appeal in accordance with the Louisiana Supreme Court case of *State v. Counterman*. This third pleading did not contain any of the grounds concerning ineffective assistance of counsel involving a conflict which he now alleges in this writ. On September 24, 1999 the trial court granted Lee's motion for an out-of-time appeal. In his brief to the appellate court Lee, for the first time, assigned as error and briefed the conflict of interest issue involving Coslow. On February 16, 2001, the First Circuit "conditionally affirmed" Lee's conviction and ordered an evidentiary hearing on the conflict issue. The trial court held the hearing and on June 24, 2003 and granted Lee a new trial finding that Colwart's representation was ineffective due to his inability to adequately cross examine his former client, Coslow, on the issue of Coslow's

intoxication at the time of the murder. The state applied for writs to the First Circuit, which reversed the trial court and affirmed Lee's conviction. Lee applied for writs to the Louisiana Supreme Court which on November 24, 2004 denied writs. Lee did not file a writ with the United States Supreme Court to review the denial of writs by the Louisiana Supreme Court.

Almost a year later, on November 22, 2005, Lee filed his third application for post-conviction relief in state district court. This third application was denied by trial court. Lee filed for writs of review with the First Circuit which denied writs. Lee filed for writs with the Louisiana Supreme Court, which denied writs.

(3) POST-CONVICTION RELIEF IN FEDERAL COURT

In the meanwhile, Lee had filed for habeas review in the Western Federal District Court, State of Louisiana on February 23, 2007 and requested that it be stayed pending the outcome of his writ in the Louisiana Supreme Court. Once the Louisiana Supreme Court denied writs, Lee's motion to proceed forward with his federal habeas was granted on May 18, 2007. The federal district court denied Lee federal habeas relief on June 28, 2007 on the grounds that the one-year statute of limitation period found in 28 U.S.C. Section 2244(d)(1)(A) did not "re-start" and run anew with the granting of the out-of-time appeal

citing *Salinas*. Both the federal district court and the Fifth Circuit denied a certificate of appealability. It is this writ which is before this court.

B. LOUISIANA'S OUT-OF-TIME APPEAL LAW AND THE APPLICATION OF *SALINAS*

(1) CONSTITUTIONAL RIGHT TO APPEAL

We begin with the principle that there is no federal constitutional right to appeal or review in a state court. *McKane v. Durston*, 153 U.S. 684, 687-688 (1894). Consequently, a federal court should defer to a state court's interpretation of a state statute on the issue of whether the type of state review is direct review or collateral review. As the facts of this case illustrate, this distinction can be critical in federal habeas. A review of the cases of the various federal circuit courts of appeal shows that the "conflict" among the circuits is, to some extent, the product of their interpretation of different state statutes and jurisprudence concerning what constitutes direct review versus collateral review. Because the federal courts are interpreting the meaning of the federal statutory term "direct review" in a state jurisprudential context and using state statutory law and jurisprudence, the perceived conflict is not significant. Moreover, to the extent that any conflict exists in the type of analysis used by the federal circuit courts, that conflict should be resolved in favor of the clear congressional intent behind the AEDPA to limit the

time span for applying for federal habeas so that appeals and writs do not drag on for years. In other words, the general intent of Congress in enacting the AEDPA to eliminate the long delays in appeals and writs should be the main consideration followed in the interpretation of any state statute or jurisprudence which defines "direct review" in a state law context.

(2) *STATE V. COUNTERMAN* AND LOUISIANA'S OUT-OF-TIME APPEAL LAW

There is no statutory or constitutional law in Louisiana concerning a defendant's right to an out-of-time appeal. The Louisiana Constitution of 1974 provides that "[n]o person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review." The Louisiana Code of Criminal Procedure provides for direct appeal in Articles 911 to 923 and for collateral review or post-conviction relief in Articles 924 to 930.8. There is no provision for an out-of-time appeal in Louisiana statutory law. The concept of out-of-time appeal in Louisiana is a product of Louisiana Supreme Court jurisprudence found in *Counterman*.

Lee asserts that there are only two methods of analysis used by the states in deciding when "direct review" ends. The decision of the Louisiana Supreme Court in *Counterman* shows another method of analysis namely, that of mode of invocation. In Louisiana

one may obtain direct review "of right" so long as the defendant files a proper motion or notice of intent to appeal. Once the date for filing for appeal has elapsed, the only other way to direct review is to file an application for post-conviction relief. The granting of any application for post-conviction relief and the ordering of direct review is discretionary with the state trial court and is normally only ordered when the defendant has not had an direct review of his conviction. The discretionary nature of the granting of post-conviction relief is a critical distinction in terms of the congressional intent to limit the length of time of writs and appeals. A defendant can sit on his application for post-conviction relief for two years after his conviction becomes final on direct review, the time requirement of Louisiana statutory law, and then file an application for post-conviction relief asking for an out-of-time appeal. If the state district court grants an out-of-time appeal of right, then the one-year federal period is extended by at least another year (the time of sentencing which is the date when the defendant's conviction became final, assuming he did not appeal, or when the court of appeals affirms his conviction or when the Louisiana Supreme Court denies his writ application) or more than one year as the case makes its way through the Louisiana appellate system. This procedure would seriously compromise the congressional intent behind the enactment of the AEDPA of limiting the time in which federal habeas can be filed so as to eliminate the long delays in federal habeas proceedings.

The Louisiana Supreme Court jurisprudentially created the procedure for obtaining an out-of-time direct appeal in the case of *State v. Counterman,* 475 So.2d 336 (La. 1985). In *Counterman,* the court stated that "[t]he central issue, therefore, is whether a defendant who seeks an appeal after the time for appealing has elapsed is relegated to post-conviction relief or whether he may file a motion for an out-of-time appeal in either the district court or the court of appeal." *Counterman*, at p. 339. The court found that "the appropriate procedural device for a defendant to seek the exercise of his right to appeal, after the delay provided in Article 914 has expired, is an application for post-conviction relief pursuant to Articles 924-930." *Counterman,* at p. 339.

As a result, the granting of a motion for out-of-time appeal is discretionary with the trial court, while a properly filed motion for appeal is of right. On the other hand, once an out-of-time appeal is granted, all of the normal state procedural rules governing appeals of right apply including, counsel if indigent, a record of the proceedings, and the right to request review of the appellate court decision by the Supreme Court.

(3) FIFTH CIRCUIT AND *SALINAS*

The Fifth Circuit Court of Appeals has considered the issue involved in this case in the context of a Texas statute and held that the granting of the appeal did not restart the one-year clock. In *Salinas* the

court found that Texas law provided for an initial right of appeal and also for a discretionary appellate review. Salinas was granted discretionary appellate review and argued that the one-year clock should start anew. The Fifth Circuit rejected this view and found that the AEDPA provides "for only a linear limitations period" which starts on a specific date and ends on a specific date so that while this time limitations period may be tolled, it may not begin to run anew. In *Salinas* the critical question concerns the "manner" or "mechanism" in which review is obtained and not the function of the review (direct review of all issues or limited review) or the terms used to define the review (direct or collateral). According to *Salinas*, once the "normal direct review" takes place, the federal AEDPA clock starts to run. While it can be tolled or stopped, it cannot be restarted.

(4) APPLICATION OF *SALINAS* IN LOUISIANA

The logic of *Salinas* has been followed in a Louisiana context in the recent Fifth Circuit case of *Butler v. Cain,* 2008 WL 2514644, 6/25/08 where the court stated "[a]lthough federal, not state, law determines when a judgment is final for federal habeas purposes, a necessary part of the finality inquiry is determining whether the petitioner is still able to seek further direct review. As a result, this court looks to state law in determining how long a prisoner has to file a direct appeal." *Butler,* p. 4. Additionally, a number of Louisiana federal district courts have

applied *Salinas* to Louisiana law. See *McGee v. Cain*, 104 Fed. Appx. 989 (5th Cir. 2004), *Soileau v. Cain*, 2005 WL 1629945, *Sparks v. Hubert*, 2008 WL 1746724, *Robinson v. Cain*, 2008 WL 821955, *Jennings v. Leger*, 2008 WL 2899571, *Tapp v. Cain*, 2007 WL 2323356, and *Gilliam v. Jones*, 2007 WL 1347807.

C. Comparative Analysis of Out-of-Time Appeal Jurisprudence in Federal Appellate Courts.

A survey of the federal jurisprudence on this issue presents two groups of cases. The first group, *Frasch*, (4th), *Summers*, (9th), and *Orange*,(10th), support Lee's position that the one-year clock restarts and begins to run anew. The second group, *Lopez*, (6th), *Teas*, (7th), and *O'Neal*, (8th), and follow the logic of *Salinas* that the one-year clock does not restart and begin to run anew.

1. *Frasch*, (4th), *Summers*, (9th), and *Orange*, (10th).

The Fourth Circuit in *Frasch v. Peguese*, 414 F.3d 518 (4th Cir. 2005) found that the granting of a new direct appeal upon the filing of an application for post-conviction relief 10 years after the right to a direct appeal had run "restarted" the one-year clock and specifically rejected the *Salinas* analysis. In *Summers v. Schriro*, 481 F.3d 710 (9th Cir. 2007), the Eighth Circuit held that a "functional analysis"

should be applied to determine what is "direct review" under the AEDPA as matter of federal law. As a result, the granting of an Arizona State Rule 32 appeal pursuant to the Arizona Rules of Criminal Procedure restarted the one-year clock because it was a "form of direct review" under Arizona law. *Summers*, p. 716. The Tenth Circuit in *Orange v. Calbone*, 318 F.3d 1167 (10th Cir. 2003) found that under an Oklahoma state statute which granted the defendant the right to file an out-of-appeal on post-conviction relief Orange's application restarted the one-year federal clock 18 months after the time for filing a direct appeal had lapsed.

2. *Lopez*, (6th), *Teas*, (7th), and *O'Neal*, (8th).

In *Lopez v. Wilson*, 426 F.3d 339 (6th Cir. 2005) the court interpreted an Ohio Rule of Appellate Procedure, Rule 26(B), which allows the re-opening of direct appeal on the basis of ineffective assistance of counsel. The court found such a re-opening of direct review to be in the nature of a "collateral post-conviction procedure." *Lopez*, p. 341. As a result, Lopez had no right to counsel for direct appeal secured through collateral post-conviction procedure. In *Teas v. Endicott,* 494 F.3d 580 (7th Cir. 2007), *Teas* filed collateral review arguing that his counsel was ineffective because he missed a deadline for appeal. The Wisconsin Supreme Court granted *Teas* "belated review" but denied review as if on direct appeal. *Teas*, p. 583. When *Teas* filed a federal habeas petition, it

was denied on the grounds that the one-year clock had run. On appeal the Seventh Circuit held that once the one-year clock runs that is it. It cannot restart. That is the "conclusion of direct review" in state court. The court cited *Evans v. Chavis*, 546 U.S. 189 (2006) and *Cary v. Saffold*, 536 U.S. 214 (2002) in support, noting that those cases recognized the need for uniformity on the question of when direct review ends, and that whatever terms are used by a state court or in a state statute to define whether it is direct or collateral does not control the decision a federal court must make on this issue. In the case of *O'Neal v. Kenny*, 2007 WL 2492466 the Eighth Circuit considered a Nebraska case in which O'Neal was granted a "new direct appeal" as a result of his application for post-conviction relief. The Eighth Circuit held this new direct appeal was not part of AEDPA direct review since it was a "new direct appeal" and not a reinstatement of a past direct appeal. As a result, the one-year clock had run on O'Neil's federal habeas petition.

D. *Salinas* Is the Correct Resolution of Any Conflict.

This analysis brings the court to the point of deciding what is the standard to be used to decide when the "conclusion of direct review" takes place, as that term is used in the AEDPA. The reliance on the terms used by a state court or statute will result in allowing the states the control when direct review is final. The use of the functional approach will also

allow the states to fix the conclusion of direct review simply by giving a defendant a new appeal. Both of these standards will greatly increase the time in which federal habeas can be timely filed. One only needs to look as far as *Frasch*, where the defendant was allowed to file federal habeas ten years after his right to direct appeal and ended, to see the abuse that can take place. If *Frasch* is held to be the correct interpretation of the AEDPA, then any state court judge in Louisiana can restart the one-year AEDPA, clock simply by granting an out-of-time appeal. Such an approach would clearly not support the goals of Congress in enacting the AEDPA of finality and respect for considered state court judgments.

This court has held that the goals of the AEDPA provisions include ensuring "that the state courts have the opportunity fully to consider federal-law challenges to a state custodial judgment before the lower federal courts may entertain collateral attack upon that judgment," and the "finality of state court judgments." *Duncan v. Walker*, 533 U.S. 167, 121 S.Ct. 2110, 150 L.Ed.2d 251 (2001).

Neither functional of definitional analysis provide an adequate standard for the court to use to determine what is "direct review" for the purpose of federal uniformity. The respondent submits that the standard found in *Salinas* best promotes the intent of Congress in enacting the AEDPA, that of finality. Salinas concentrates on the "manner" or "mechanism" in which the review is obtained and not on the function of the review (direct review of all issues or limited review) or on the terms used to define it (direct

or collateral). As a result, once the "normal direct review" takes place, the federal AEDPA clock starts to run. While it can be tolled, it cannot be restarted.

An analysis of these cases reveals that many of them arise in cases of guilty pleas where involving counsel who failed to timely appeal a conviction. Experience shows that in Louisiana a district court when faced with the thorny issues of ineffective assistance of counsel on post-conviction relief will simply grant an out-of-time appeal hoping that the court of appeals will resolve the issue without an extensively time consuming evidentiary hearing.

E. Should Writs be Granted in Light of the Writ Grant in *Jimenez v. Quarterman*?

The question of whether there is a sufficient conflict among the circuits to justify the granting of writs in this case may be moot in light of the recent granting of writs in the similar case of *Jimenez v. Quarterman,* No. 07-6984, 3/17/08, 128 S.Ct. 1646, 170 L.Ed.2d 352. As a result, this court may decide to simply wait upon the decision in that case and then either dismiss the petition or remand Lee's petition to the district court for reconsideration in light of the decision in *Jimenez*. On the other hand, this court may want to grant writs in *Lee* and consider the application of *Salinas* in the context of Louisiana's out-of-time appeal procedure.

CONCLUSION

The respondent initially argues that writs should not be granted in this case for three reasons. First *Salinas* is the correct interpretation of the AEDPA. Second, any conflict among the circuits is not substantial. Finally, this court has granted writs in *Jimenez* on the same question that this case presents. On the other hand, this court may decide to grant writs so that the application of *Salinas* under both Texas and Louisiana law can be fully briefed and decided.

PRAYER

WHEREFORE, the respondent prays that this court deny this Application for Writs.

Respectfully submitted,

16th Judicial District
J. PHIL HANEY
District Attorney
WALTER J. SENETTE, JR. 11935
Counsel of Record
Assistant District Attorney
St. Mary Parish
Courthouse Building –
Fifth Floor
Franklin, LA 70538
337-828-4100 ext. 550